(10)

No. 03-44

In the
Supreme Court of the United States

BASIM OMAR SABRI

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Section 666(a)(2) of Title 18 is unconstitutional on its face because it imposes federal criminal regulation on local conduct that is unrelated to any exercise of Congress' power to spend money to "provide for the . . . general welfare." U.S. CONST. art. I, § 8, cl. 1.

As recently as its brief in the Court of Appeals below, the Government had contended that the Court's conditional spending cases authorized § 666. That position was incorrect, Pet. Br. 25-35, and the Government correctly abandons it. As the Government acknowledges, "[i]n this case, the United States did not encourage or require state governments to regulate. Instead, Congress enacted federal legislation itself . . . ." Resp. Br. 43.

The Government's new argument that § 666(a)(2) is justified by the Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18, does not free the statute from the limitations on the spending power, and it does not change the result of this case. § I.A. As the Court has long held, the Necessary and Proper Clause "is not the delegation of a new and independent power, but simply provision for making effective the powers theretofore mentioned." *Kansas* v. *Colorado*, 206 U.S. 46, 88 (1907). When the Court has reviewed claims of authority under the Necessary and Proper Clause, it has therefore considered two questions: First, how attenuated is the connection between the regulation and the underlying grant of federal power? Second, how deeply does the regulation intrude into areas of traditional state authority? § I.A.1. When the connection to an enumerated power has been too attenuated, and the intrusion on state authority too deep, the Court has held the regulation unconstitutional, as it did most recently in *United*

States v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 529 U.S. 598 (2000). § I.A.2.

Judged under the Court's precedents, § 666(a)(2) is facially unconstitutional. § I.B. The statute claims a criminal regulatory power that lies at the extreme fringe of Congress' authority under the General Welfare Clause, if that power exists at all. § I.B.1. It acts in an area that by long tradition has belonged to the States and embraces a sweeping range of wholly local conduct. § I.B.2. And it imposes federal criminal liability on conduct that has only the most attenuated connection to federal spending, if there is any connection at all. To uphold § 666(a)(2), the Court would have to adopt an analysis that would undermine the enumeration of powers and open the door to a federal power to regulate for the general welfare. § I.B.3.

The Court has consistently held that it "may not in a criminal statute reduce its generally inclusive terms so as to limit its application to only that class of cases which it was within the power of the Legislature to enact, and thus save the statute from invalidity." *Yu Cong Eng* v. *Trinidad*, 271 U.S. 500, 522 (1926). Section 666(a)(2) applies indiscriminately to local conduct that falls outside Congress' power to regulate. It is therefore unconstitutional on its face. § I.D.

ARGUMENT

I. Section 666(a)(2) Of Title 18 Exceeds Congress' Limited Powers Under Article I Of The Constitution.

Section 666(a)(2) of Title 18 is unconstitutional on its face because it imposes federal criminal regulation on local conduct that is unrelated to any exercise of Congress' power to spend money to "provide for the . . . general welfare." U.S. CONST. art. I, § 8, cl. 1.

A. When A Regulation Is Claimed To Be Necessary And Proper, The Court Judges Its Connection To The Underlying Granted Power And Its Disruption Of The Balance Of Federal And State Power.

Beginning in *McCulloch* v. *Maryland*, 4 Wheat. (17 U.S.) 316 (1819), and continuing ever since, the Court has reserved for itself and exercised the authority to enforce the limits of federal power under the Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18. As Chief Justice Marshall wrote, "We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended." *Id.*, at 421. In each case, the Court asks the same question: Whether the connection between the regulation and the underlying grant of power is "so attenuated as to undermine the enumeration of powers set forth in Article I, § 8." *Jinks* v. *Richland County*, 538 U.S. 456, 123 S. Ct. 1667, 1672 (2003).

1. Congress' Discretion Does Not Shield § 666(a)(2) From Review.

The Government repeatedly argues that the Court should defer to Congress' judgment of the connection between § 666(a)(2) and the spending power. Resp. Br. 16-17, 46. It is true that Congress holds discretion in drafting federal law. But it does not follow "that in every instance the Court lacks the authority and responsibility to review congressional attempts to alter the federal balance." *Lopez*, 514 U.S., at 575 (Kennedy, J., concurring). Rather, "despite the breadth of the legislative discretion, our duty to hear and to render judgment remains." *United States* v. *Butler*, 297 U.S. 1, 67 (1936).

In both *Lopez* and *Morrison*, the Government invoked the Necessary and Proper Clause. *See* Brief of

the United States in No. 93-1260, pp. 2, 12-13; Reply Brief in No. 93-1260, p. 15; Brief of the United States in Nos. 99-5, 99-29, p. 21. Yet in both cases, the Court reasserted its duty and authority to judge the claimed relationship to a federal power. "'[W]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.'" *Morrison*, 529 U.S., at 614 (quoting *Lopez*, 514 U.S., at 557, n.2) (internal quotation marks omitted). As Justice Kennedy explained in his concurring opinion in *Lopez*, "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far." 514 U.S., at 578.

2. The Court Has Consistently Struck Down Statutes Regulating Conduct That Lacks A Nexus To A Granted Federal Power.

In judging whether the Federal Government has tipped the scales of power too far, the Court examines the balance from both sides. First, it inquires how far the federal regulation strays from the granted federal power. Second, it considers how deeply the regulation intrudes into areas of traditional state authority. The ultimate question is whether the regulation "undermine[s] the enumeration of powers set forth in Article I, § 8." *Jinks*, 123 S.Ct., at 1672. If it does that, it is unconstitutional.

This analysis is not of recent origin. The Court applied it, and struck down a statute, in *United States* v. *Fox*, 5 Otto (95 U.S.) 670 (1878). There, the statute prohibited fraudulently acquiring goods on credit

within three months of bankruptcy. Although the Government argued that the statute was necessary and proper to implement Congress' power to regulate bankruptcies, the Court nonetheless held the statute unconstitutional. First, the regulation's connection to the federal power was too attenuated, because "[h]ere an act which may have no relation to proceedings in bankruptcy becomes criminal, according as such proceedings may or may not be subsequently taken . . . ." *Id.*, at 672. Second, the statute intruded deeply into traditional state authority over criminal law: "[A]n act committed within a State, whether for a good or a bad purpose, or whether with an honest or a criminal intent, cannot be made an offence against the United States, unless it have some relation to the execution of a power of Congress . . . ." *Ibid.*

More than one hundred years later, the Court took the same approach to the constitutional questions in *Lopez* and *Morrison*. Both times, the Court examined the claimed connection to a federal power and compared it to the intrusion on areas of traditional state control. And both times, the Court held the statute unconstitutional because of the threat it posed to federalism by undermining the enumeration of powers. Pet. Br. 32-34. In *Lopez*, the Court struck the statute down because the defined offense of possessing a firearm within 1,000 feet of a school zone bore only an attenuated relationship to the asserted source of power under the Commerce Clause, and the statute also intruded deeply into the States' traditional authority over criminal law. *Lopez*, 514 U.S., at 561, n.3, 566-67. In *Morrison*, the Court held the statute unconstitutional because the defined offense of committing a crime of violence motivated by gender likewise bore only an attenuated relationship to the

Commerce Clause, and it too upset the balance of federal and state power. *Morrison*, 529 U.S., at 617-19.

The Government is thus incorrect to suggest that principles of federalism matter to the constitutional analysis only when the federal statute conscripts state officials or infringes on a State's sovereign immunity. Resp. Br. 39-40. It is true that state sovereignty alone is at times sufficient to repel federal power. Pet. Br. 37-40 (citing *Alden* v. *Maine*, 527 U.S. 706, 732 (1999); *Printz* v. *United States*, 521 U.S. 898, 923 (1997)). But principles of federalism do not cease to be relevant, whenever they are not sufficient alone. The Court's decisions in *Fox*, *Lopez*, and *Morrison* all stand for the proposition that, in judging whether a regulation exceeds Congress' enumerated powers, the Court may appropriately consider the effect the regulation has on the balance of federalism that the enumeration is intended to protect. Pet. Br. 35-37.

B. Measured Under The Court's Precedents, § 666(a)(2) Is Unconstitutional.

Section 666(a)(2) suffers from the same defects that afflicted the statutes held unconstitutional in *Fox*, *Lopez*, and *Morrison*, but to a greater degree. It is therefore unconstitutional.

1. The Power To Regulate Exists, If At All, Only On The Extreme Fringe Of Congress' Authority Under The Spending Power.

First, the Government correctly argues that this case is different from *Lopez* and *Morrison* because "[t]his case does not involve an exercise of Congress's power to enact criminal laws to effectuate a specific enumerated grant of regulatory authority." Resp. Br. 36. But the argument favors Petitioner. Whereas the power to regulate falls within the core of the enumerated powers, it exists, if at all, only on the

extreme fringe of Congress' authority to spend money to provide for the general welfare. Pet. Br. 12-14.

The history of the Court's spending power precedents is a history of limiting Congress' power to condition grants of spending, so as to tie that authority to the core power of appropriating money and prevent it from becoming a power to regulate for the general welfare. In *South Dakota* v. *Dole*, 483 U.S. 203 (1987), for example, the Court stated that a condition must be reasonably related to the federal spending, which ensures that Congress is specifying how funds should be spent and not using federal money as a civil fine to force state officials to implement a federal regulatory scheme. *Cf. Printz*, *supra*. The requirement that the amount of money at stake not be so large as to be coercive is likewise intended to flush out federal regulation (backed by civil fines) disguised as conditional spending. Pet. Br. 31-34.[1] And the requirement of *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1 (1981), that conditions be stated unambiguously, is derived directly from the fact that the power to spend is not a power to regulate. In *Pennhurst*, the Court held that Congress had not elected to forcibly regulate under the Fourteenth Amendment. *Id.*, at 16-17. Then, turning to the spending power, the Court declared that "*[u]nlike* legislation enacted under § 5, however, legislation enacted pursuant to the spending power is much in the nature of a contract," and therefore "[t]he legitimacy of

[1] The paradox the Government sees in Petitioner's coercion argument (Resp. Br. 45) does not exist. If a condition extends only as far as the federal money, funding recipients may give up small portions of their federal money to free small portions of their employees from federal regulation. The coerciveness of § 666 is that it requires a funding recipient to reject *all* of its federal funding to free *any* of its agents from federal criminal authority. The all-or-nothing choice betrays § 666 as an unduly coercive exercise of regulatory power.

Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Id.*, at 17 (emphasis added).

As often as it has been advanced, the argument that the Government may regulate directly under the spending power has been rejected. Pet. Br. 11-14. "The proposition, often advanced and as often discredited, . . . that Congress, entirely apart from those powers delegated by the Constitution, may enact laws to promote the general welfare, [has] never been accepted but always definitely rejected by this court." *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 291 (1936). In *Butler*, the Court struck down a spending-power statute precisely because Congress, in a claimed exercise of the authority to condition spending, had strayed too far into direct regulation. 297 U.S., at 73-75. Had it not rejected the claim, the Court worried that it risked authorizing a general police power: "If, in lieu of compulsory regulation of subjects within the states' reserved jurisdiction, which is prohibited, the Congress could invoke the taxing and spending power as a means to accomplish the same end, clause 1 of section 8 of Article I would become the instrument for total subversion of the governmental powers reserved to the individual states." *Id.*, at 75; *see also Dole*, 483 U.S., at 217 (O'Connor, J., dissenting) (*Butler*'s "discussion of the spending power and its description of both the power's breadth and its limitations remain sound").

Section 666(a)(2) lies even farther from the core of the spending power than the statutes that the Court has struck down, claiming criminal regulatory authority over conduct that has only the most tenuous connection to any federal spending. The Court has never recognized that expansive authority, and the five decisions of the Court that the Government cites in its

support do not hold to the contrary. Resp. Br. 25-28, 34-35, 42.

Two of the five decisions addressed only issues of statutory interpretation. *See Fischer* v. *United States*, 529 U.S. 667 (2000); *Dixson* v. *United States*, 465 U.S. 482 (1984). Neither of those cases addressed the scope of Congress' authority to regulate under the spending power, and "[c]onstitutional rights are not defined by inferences from opinions which did not address the question at issue." *Texas* v. *Cobb*, 532 U.S. 162, 169 (2001). Moreover, to the extent that implications about the constitutionality of § 666(a)(2) can be drawn from either decision, they support Petitioner. In *Fischer*, the Court agreed that turning "almost every act of fraud or bribery into a federal offense [would] upset[] the proper federal balance." 529 U.S., at 681.[2] Justice Thomas in dissent stated even more plainly the constitutional defect: "Without a jurisdictional provision that would ensure that in *each* case the exercise of federal power is related to the federal interest in a federal program, § 666 would criminalize routine acts of fraud or bribery, which, as the Court admits, would upset the proper federal balance." *Id*, at 689, n.3 (internal quotation marks omitted). In *Dixson*, the Court was careful to explain that it would not interpret the criminal statute before it, 18 U.S.C. § 201, to apply indiscriminately to individuals who had no connection to a federal program, saying, "[W]e do not mean to suggest that the mere presence of some federal assistance brings a local organization and its employees within the jurisdiction of" § 201. 465 U.S., at 499. And Justice O'Connor's

[2] The *Fischer* Court did not have to grapple with the effect of this conclusion on the facial constitutionality of § 666(a)(2), because as the Government stated in its brief in *Fischer*, "This case does not present the question whether federal funds must be linked to the conduct prohibited by Section 666." Br. for Respondent in No. 99-116, p. 32.

dissenting opinion, in which then-Justice Rehnquist and Justice Stevens joined, anticipated the constitutional concerns that are presented in this case, warning that applying federal criminal statutes to local governments "raises problems of autonomy and federalism." *Id.*, at 511.

Three of the decisions cited by the Government did sustain federal criminal statutes against constitutional challenge, but in none of them did the Court hold that the source of the federal authority was a bare exercise of the spending power. First, in *United States* v. *Hall*, 8 Otto (98 U.S.) 343 (1878), the Court sustained a statute making it a criminal offense for a guardian to embezzle a soldier's federal pension. But the Court based Congress' authority on its regulatory power over the military, saying that "[e]ven the respondent admits that Congress may . . . raise and support armies." *Id.*, at 351. In addition, the Court considered the pensioners "wards of the United States," *id.*, at 353, something that cannot be said of the governments to which § 666(a)(2) applies, *see* Pet. Br. 28-29.

Second, in *Westfall* v. *United States*, 274 U.S. 256 (1927), the Court upheld a federal statute making it a criminal offense to commit acts of fraud against banks in the federal reserve system. But again the Court did not invoke the spending power. Instead, the Court referred to the banks as "instrumentalities of the United States," *id.*, at 259, and invoked Congress' power under the Commerce Clause, *ibid.*, which undoubtedly reaches banks in the federal reserve system.

The Government's strongest authority is the Court's decision in *Salinas* v. *United States*, 522 U.S. 52 (1997), in which the Court stated in dictum that a different subpart of § 666 that Petitioner does not challenge—§ 666(a)(1)(B), not § 666(a)(2)—"did not extend federal

power beyond its proper bounds." 522 U.S., at 61. *Salinas* is distinguishable because it involved a different subpart, but more importantly it is distinguishable because it addressed a different type of question. *Salinas* arose on appeal after a conviction, where a court can conduct harmless error review based on its own examination of the factual record. FED. R. CRIM. P. 52(a). That is what *Salinas* effectively did. Although the jury had not been required to find that the alleged corruption had a connection to a federal power, the Court was able to conclude on its own analysis that any error in that regard was harmless. The defendant had accepted a bribe to influence his duties in housing a federal prisoner, and that directly affected the Government's ability to enforce its legitimately imposed punishment. *Salinas*, 522 U.S., at 61; *Neder* v. *United States*, 527 U.S. 1, 8-15 (1999) (failure to submit element to jury may be harmless). This case, by contrast, arises not after conviction, but on appeal from the district court's dismissal of the indictment. The question presented is not whether any error is harmless, but whether a facial constitutional error exists because § 666(a)(2) applies generally to local conduct that has no connection to any federal spending, without requiring the jury to find a connection in each specific case. *Salinas* did not resolve that question. Indeed, the Court devoted only four sentences to the constitutional issue, and it did not cite the General Welfare Clause. Rather, the Court cited *Westfall*, which, as Petitioner has explained, rested on the Commerce Clause and Congress' authority to protect instrumentalities of the Federal Government.

The Court has never recognized the power to regulate under the General Welfare Clause that the Government seeks here. At the outset, then, the

burden of justifying § 666(a)(2) is heightened, because if the authority to enact such a law does not fall outside the spending power entirely, it lies at the power's extreme fringe.

2. Section 666(a)(2) Intrudes Deeply Into State Authority Over Criminal Law.

Section 666(a)(2) also intrudes deeply into traditional state authority over criminal law. The Government concedes § 666(a)(2)'s scope in the section of its brief addressing statutory interpretation, yet attempts to obscure it in the section defending the statute's constitutionality. There, the Government repeatedly states that the statute applies to *agencies* that receive federal funding.[3] But it is simply not correct that § 666 applies only to the particular agencies that receive federal funds. Rather, when any portion of an organization, government, *or* agency receives the requisite $10,000 in federal funds, the statute applies to "the covered 'organization, government, *or* agency'" as a whole. Resp. Br. 18-19 (quoting *Salinas*, 522 U.S., at 57) (emphasis added). All of a government's or organization's agents become subject to the statute, regardless whether they have any connection to the federal program. Pet. Br. 17-24.

Even more importantly, the section of the statute that Petitioner is challenging, § 666(a)(2), applies to all of the private citizens who attempt to influence any agent of the covered governments or organizations. That section consequently has an extraordinary reach.

[3] *See, e.g.*, Resp. Br. 12 (the statute's "requirements limit Section 666 to significant acts of corruption where, because the relevant *agency* receives the requisite federal benefits, there is a strong federal interest . . . .") (emphasis added); *id.*, at 13 ("Section 666 is closely tied to the United States' strong interest in guarding against the threat to its funds and programs created by financial corruption in the *agencies* that administer them.") (emphasis added); *id.*, at 32, 33, 39.

The governors, representatives, and senators of every state are subject to § 666. Pet. Br. 18. Thus, if a local person offers a bribe to a state representative, the Government asserts a federal criminal interest through § 666(a)(2). It does not matter what the subject matter is, or whether it has any connection to a federal program. It does not matter even if the offer is refused. Likewise, every employee of every private organization that receives $10,000 in federal benefits within a one-year period is subject to § 666. For example, between 1995 and 1997, General Electric, one of the world's largest corporations, received $542,000 in federal benefits under the Department of Commerce's Advanced Technology Program. 15 U.S.C. § 278n; http://www.atp.nist.gov (visited on 2/12/04). By virtue of that grant, all of GE's employees fell within § 666, and every person who attempted to influence any of those employees regarding a transaction valued at $5,000 or more fell within § 666(a)(2).

It is difficult to comprehend, let alone describe, the variety and magnitude of local, private conduct over which § 666(a)(2) asserts federal criminal jurisdiction. The Government frankly admits that § 666(a)(2) reaches too far by attempting to supplement the statute with its prosecutorial discretion. Resp. Br. 48. The limits of federal power, however, do not depend on a federal prosecutor's discretion. And here, the Government concedes that, discretion notwithstanding, it may bring cases "in which the government's interest in applying Section 666 will not meet a federal nexus test." *Ibid.* To say that § 666(a)(2) "effects a change in the sensitive relation between federal and state criminal jurisdiction," *Lopez*, 514 U.S., at 561, n.3 (quotation marks omitted), does not adequately capture the statute's intrusion on state authority. Section 666(a)(2) "upsets the federal balance to a degree that

renders it an unconstitutional assertion" of federal power. *Id.*, at 580 (Kennedy, J., concurring).

3. The Rationales Advanced To Justify § 666(a)(2) Threaten To Undermine The Enumeration Of Powers.

Because § 666(a)(2) applies to private conduct that has no apparent connection to federal spending, Pet. Br. 16-18, 32; *supra* § I.A.2, the rationales that the Government must advance to justify it would equally justify regulation of "all activities that may affect the success of federally funded programs." Resp. Br. 38.

The Government offers two rationales to connect the conduct regulated by § 666(a)(2) to a federal interest. First, it argues, corruption in an unrelated part of an organization or government may lead to corruption in federally-funded programs. Resp. Br. 31-32. Second, it argues, because money is fungible, an effect on any part of a government's or organization's finances can "place additional burdens on federal funded programs, impairing their achievement of federal program goals." Resp. Br. 33.

These rationales are equally as attenuated as the "costs of crime" logic that the Court rightly rejected in *Morrison* and *Lopez*, and, like that logic, they "would bid fair to convert congressional authority under [the one power] to a general police power of the sort retained by the States." *Lopez*, 514 U.S., at 567; *see* Pet. Br. 32-35. If Congress may regulate offers of bribes made to agents unconnected to any federal program because of the effect those offers may have on the beneficiary's finances, then it may regulate unconnected theft from beneficiaries as well—because that would also "drain commingled resources from or place additional burdens on federal funded programs, impairing their achievement of federal program goals."

Resp. Br. 33. And if the Government may enact criminal regulation to guard against a "potential threat to federal funds and programs," Resp. Br. 46, surely it may take the lesser step of enacting civil regulation to protect against potential, and real, threats as well. Under the Government's rationale, Congress could thus enact a federal law of contract, of unjust enrichment, of conversion, fraud, promissory estoppel, tortious inference with contract, and the whole host of other bodies of common law that till now have been thought the traditional province of the States.

The Government ultimately admits that its defense of § 666(a)(2) rests on the asserted authority to "polic[e] the integrity of the entities to which its funds and programs are entrusted." Resp. Br. 38. In truth, § 666(a)(2) extends beyond that to police the integrity of anyone who interacts with any agent of a federally funded entity. The Court has never held that Congress possesses that authority, and for good reason. "'[T]he principle that the Constitution created a Federal Government of limited powers,' while reserving a generalized police power to the States, is deeply ingrained in our constitutional history." *Morrison*, 529 U.S., at 618, n.8 (quoting *New York* v. *United States*, 505 U.S. 144, 155 (1992)) (internal quotation marks omitted). Accepting the Government's rationale would place the Court, not at the top of a slope leading to a generalized police power, but at its bottom.

C. The Government's Asserted Need To Suppress Corruption Cannot Justify § 666(a)(2).

The Government asserts that it will be left "toothless" if the Court sustains Petitioner's challenge to § 666(a)(2). For three reasons, this assertion does not justify the statute.

First, the assertion addresses the wrong point. "The concern of our citizens with curbing criminal activity is certainly a matter requiring the attention of all branches of government. As weighty as this concern is, however, it cannot justify legislation that would otherwise fail to meet constitutional standards . . . ." *Kolender* v. *Lawson*, 461 U.S. 352, 361 (1983). As the Court stated in *New York*, it is not sufficient that there be a legitimate interest, there must be a granted power: "[T]he Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." 505 U.S., at 187. Thus, although Petitioner does not doubt the interest in reducing corruption, it is nonetheless true that "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *Morrison*, 529 U.S., at 607. For statutes based on the spending power, federal funding is not a "happenstance," Resp. Br. 21, it is the only basis for federal authority. Section 666(a)(2) is not sufficiently connected to Congress' power to spend for the general welfare to justify its intrusion into traditional State authority over criminal law, and it is therefore unconstitutional.

In addition, the Government fails to supply any evidence for the claimed necessity of § 666(a)(2). Congressional findings may help the Court to judge whether conduct "substantially affect[s]" a granted federal power "even though no such substantial effect [is] visible to the naked eye." *Lopez*, 514 U.S., at 563. But no findings support § 666(a)(2). The passage from the Senate report that the Government cites (Resp. Br. 3-4) do not contain findings, just declarations. Moreover, the necessity the report claims is limited to

corruption within federally funded programs. The report does not claim the need to reach outside those programs, as § 666(a)(2) does. *See* S. Rep. No. 225, 98th Cong., 1st Sess. 369-70, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510-11. Finally, the claimed necessity was predicated on a supposed gap in the law created by lower courts' interpretations of 18 U.S.C. § 201, an interpretation that the Government acknowledges was reversed by the Court's decision in *Dixson*, shortly after § 666 was enacted. The legislative record does not support the asserted necessity for § 666(a)(2).

Ruling for Petitioner also will not call forth the horribles that the Government recites. Resp. Br. 37-38, 41-42. Petitioner has conceded that the Government may protect its own institutions and property, and that if the mail and wire fraud statutes capture corrupt conduct within the Commerce Clause, the Government may enforce them. Pet. Br. 27-28, 30. Petitioner has conceded as well the Government's authority under the spending power to require funding recipients to consent to be subject to private suits for damages. Pet. Br. 29-30. And although the Government embraces the Court of Appeals' mistrust of state officials, Resp. Br. 37-38, the laws of every State address corruption as well, Pet. Br. 29, and "[a]s public servants, the officials of the State must be presumed to have a high degree of competence in deciding how best to discharge their governmental responsibilities." *Frew* v. *Hawkins*, 124 S.Ct. 899, 906 (2004). There is no need for the Court to extend the spending power beyond its limits to affirm § 666(a)(2), when the federal and state governments can address their interest in so many other, legitimate ways.

D. Petitioner's Challenge To § 666(a)(2) Is Properly A Facial Challenge.

The Court has consistently analyzed challenges to Congress' power to enact general criminal statutes as facial challenges, and it has struck down unconstitutional statutes on their face. The three primary cases Petitioner discussed above—*Fox*, *Lopez*, and *Morrison*—each held a statute facially unconstitutional. In addition, *see United States* v. *Reese*, 92 U.S. 214, 221 (1876); *Butts* v. *Merchants & Miners Transp. Co.*, 230 U.S. 126 (1913). In *Yu Cong Eng* v. *Trinidad*, 271 U.S. 500, 522 (1926), the Court explained that "we may not in a criminal statute reduce its generally inclusive terms so as to limit its application to only that class of cases which it was within the power of the Legislature to enact, and thus save the statute from invalidity."

The Government has at times expressly requested the Court to allow it to enforce a general statute against the portions of the covered conduct that fall within Congress' powers, but the Court has refused:

> It has been suggested that if Congress has power to regulate trade-marks used in commerce with foreign nations and among the several States, these statutes should be held valid in that class of cases, if no further. . . . [But] it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body.

Trade-Mark Cases, 100 U.S. 82, 98 (1879). *See also United States* v. *Darby*, 312 U.S. 100, 120-21 (1941).

The Government agrees that the Court cannot interpret § 666(a)(2) to contain a nexus element. Pet. Br. 20-24; Resp. Br. 18-19, 22. But its invitation to conduct as-applied challenges to the statute, Resp. Br. 15, 45-48, would reach the same result, as the cases just discussed have all recognized. As-applied challenges would *de facto* add the nexus element that Congress rejected by requiring a factfinder in every case to find something more than the statute requires. Moreover, it would improperly substitute a judicial factfinder for the jury that the Constitution requires. *See Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000); *United States* v. *Brunshtein*, 344 F.3d 91, 99 (CA2 2003) (if § 666 requires proof of a nexus, a jury must find it). That is something the Court has long refused to allow, because "[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *Reese*, 92 U.S., at 221.

The Court's many decisions sustaining facial challenges to Congress' power to enact criminal statutes are not inconsistent with its decisions in *United States* v. *Raines*, 362 U.S. 17 (1960), and *United States* v. *Salerno*, 481 U.S. 739, 745 (1987), as the Government implies. Resp. Br. 46-47. *Raines* reviewed a civil statute, so it did not implicate the Sixth Amendment right to have a jury find all the facts necessary for conviction. Indeed, it expressly distinguished the criminal cases such as *Reese* on which Petitioner relies. *Raines*, 362 U.S., at 23; *see also Butts*, 230 U.S., at 137 (distinguishing challenge to civil statute). In *Salerno*, the Court addressed a statute regulating pre-trial detention that also did not implicate the Sixth Amendment. In addition, Congress undisputedly had power to enact that statute, and the

only question was whether in some instances its application conflicted with an independent constitutional right. *Salerno*, 481 U.S., at 746. That is a different type of challenge than the challenge to Congress' power presented in this case, for two reasons. First, the question of whether a statute violates an independent right is not a question that *Apprendi* or any other case requires to be decided by a jury. Second, because the Court's only authority is to enforce the constitutional right, it ordinarily has no power to declare the statute void in general, only where it conflicts with the right. *Marbury* v. *Madison*, 1 Cranch (5 U.S.) 137, 178 (1803).

When the challenge is to Congress' power to pass the statute, the analysis is different. As explained above, the Court's task then is to decide whether the statute applies to a body of conduct that categorically falls within federal power, or else contains an element requiring the jury to find the necessary connection. If the statute fails those tests, it is unconstitutional in every application and is therefore facially invalid. *See* Pet. Br. 34-35 (quoting *Babbitt* v. *Sweet Home Chapter of Cmty. for a Great Ore.*, 515 U.S. 687, 731-32 (1995) (Scalia, J., dissenting)). That is § 666(a)(2)'s failing.

CONCLUSION

The Court should hold that 18 U.S.C. § 666(a)(2) is unconstitutional on its face.

Respectfully submitted,

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